SPECIAL
LAND TENURE

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THE SPECIAL LAND TENURE BILL OF 1911.

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THE SPECIAL LAND TENURE BILL OF 1911

A CRITICAL ANALYSIS

BY

HERBERT W. KNOCKER

High Steward of the Honor of Otford in the Hundreds of Codsheath and Somerden, &c., &c., and District Registrar for Kent of the Manorial Society

TOGETHER WITH

A PREFACE CONTAINING SOME ACCOUNT OF

GAVELKIND AND BOROUGH ENGLISH

BY

THE REGISTRAR OF THE SOCIETY

THE MANORIAL SOCIETY

1, MITRE COURT BUILDINGS, TEMPLE, LONDON, E.C.

1911

SPECIAL LAND TENURE BILL.

THE MAIN FEATURES OF THE BILL ARE THAT:—

By Section 1 it abolishes the customs of Gavelkind and Borough English and all other customs affecting the descent or alienation of freeholds or the rights of husbands and wives therein.

2. Abolishes all customary modes of descent in copyholds and customary freeholds.

3. Abolishes all customs differing from the general law as to freeholds with regard to curtesy and freebench (dower) in copyholds or customary freeholds.

4. Abolishes all special customs enabling married women to alienate copyholds or customary freeholds without separate examination.

5. Makes customary freeholds which are now transferable by deed of bargain and sale or similar assurance transferable either as before or by deed of grant.

6. Makes legal copyhold and other customary estates subject to Part I. of the Land Transfer Act, 1897.

7. Makes legal copyhold and other customary estates subject to section thirty of the Conveyancing and Law of Property Act, 1881.

PREFACE.

The first reading of the Special Land Tenure Bill occurred just as The Manorial Society was about to print and publish a Monograph entitled "Kentish Manors and Tenures: a scheme for their delimitation," by Mr. Herbert W. Knocker, with an Introduction by Mr. Atherley Jones, K.C., M.P.

As it appeared to our Executive that if the Bill became Law the delimitation of Gavelkind lands would be of no practical value, Mr. Knocker was requested to prepare a Critical Analysis of the Bill itself.

This he has been good enough to do at very short notice, and our Fellows and Associates are urged to favour the Society, through me, with their views upon the policy of the proposed measure.

It has, of course, been impossible for Mr. Knocker—in the limited time and space at his disposal—to discuss all the results of such a measure, but he undoubtedly shows that they cannot prove so simple or so innocuous as those responsible for the introduction of the Bill possibly anticipate.

Surprise, not unmixed with contempt, has frequently been expressed by our Colonists and by our American cousins at the complicated state of our Land Laws and at the piecemeal legislation essayed to bring them into line with modern ideas and requirements. Indeed, many of our own countrymen have passed severe strictures upon the apathy of successive Governments in that direction.

In the beginning of the nineteenth century the learned John Eykyn Hovenden, in one of his notes to Blackstone's Com-

mentaries upon the Rules of Descent, saye "it is surely high time that . . . *the arbitrary rules of the Feudal Law, the reasons for which (such as they are) have ceased, should give way to the* RESTITUTION *of a code of laws regulating real property in a manner more simple and more accordant with natural feeling.*"

At that time—and it was nearly 100 years ago—a Commission to investigate the law of real property wae sitting, but the rules of descent, except for the few changes made by the Inheritance Act, 1833, remain almost as they then were, and until the introduction of this Bill those fragments of Saxon liberties, still preserved and enshrined in customs of Gavelkind and Borough English, have not been interfered with and no attempt has been made to abrogate the customary rights of Widows, who, by reason of the death intestate of their husbands, have been endowed in some cases of all, and in others of one-half, instead of the common law one-third.

In a prefatory note such as this, it is impossible to dea exhaustively with the ancient customs and liberties sought to be abolished by the framer and supporters of this Bill, but, for the information of those of our members who, not being Lords or Stewards of Manors, may have forgotten all they once knew about Gavelkind, Borough English and Customary Freehold Curtesy Dower and Freebench, I venture to submit the following observations in the full knowledge, however, that they only touch the fringe of a subject that has not only bulked largely in the works of our great legal luminaries of the past, but is of considerable importance to many men and women of to-day whose ancient rights and liberties this Bill assails, and that without a shred of sanction by recommendation of Royal Commission or otherwise.

Lands subject at law or in equity to the custom of Gavelkind comprise not only large areas of land in the County of Kent which are held by what was before the Conquest the general custom of the realm, and are said to be "of the nature of Gavelkind of common right," but also land, in the aggregate of considerable extent, lying within several Manors and Seigniories

throughout England and Wales, where similar customs, in more or less modified forms, are in force.

The main incidents of Gavelkind tenure and custom are:—

(*a*) The descent to all the sons or other heirs male; for, as Littleton in his Tenures (circa 1481) says, every son is as great a gentleman as the eldest son is, and perchance will grow to greater honour and valour if he hath anything by his ancestors.

(*b*) If any of such heirs male should die in the ancestor's lifetime leaving a daughter, that daughter will inherit her Father's share.

(*c*) The dower of the Widow is one-half, instead of as at common law one-third, and in this connection it should be noted that by Special Customs obtaining in certain of the Manors and Seigniories before mentioned (all of which customs the Bill seeks to abolish) the Widow is entitled to ALL her late husband's lands.

(*d*) The husband of a woman dying seised of Gavelkind lands is tenant by the curtesy of England—whether there has been issue born of the marriage or no—of one-half of the lands during the time he remains unmarried.

By the Bill it is sought to make him tenant of the WHOLE of the lands provided that issue was born of the marriage according to the existing common law, as such law applies to lands of freehold tenure.

(*e*) The tenant may aliene his land by feoffment at the age of 15—a privilege which has been rendered much less important since the Settled Land Act legislation.

These ancient Saxon rules of descent and alienation have in the past been highly prized by the Kentish men, who accounted them as no small part of those rights and liberties so successfully maintained against the Norman Invader at the cost of severe struggles and much bloodshed.

It is true that by an Act passed in the 31st year of the Reign

of Henry the Eighth the lands of several large landowners in Kent were made descendable to the eldest son, but, as an old authority points out, the reason for this having been done was "for that by means of that Custome (Gavelkind) divers ancient and great families after a few descents came to nothing."

As there is no preamble to the present Bill, it is, of course, impossible to say whether or not a similar reason has moved those who are responsible for it. At all events, it may be fairly assumed that, if this is so such a reason would not commend itself to the advocates of Small Holdings.

Lands subject to the custom of Borough English exist in several counties of England, and formerly formed the whole or parts of ancient towns called boroughs, from which, as Littleton says, come the burgesses of the Parliament to the Parliament when the King hath summoned his Parliament.

The tenure of these lands, another fragment of Saxon liberty, is called Tenure in Burgage, and amongst other Special Customs and usages peculiar to, but not invariably attached to, that tenure is one called Borough English.

The custom of Borough English is that the youngest son, and not the eldest, succeeds on the death of his father intestate, and, as Blackstone points out, a similar custom obtained in Germany and other Northern Nations where the eldest sons, from time to time, seeking new habitations the youngest naturally becomes the heir. Littleton says that this custom stands with some certain reason, because the younger son (if he lack father and mother), because of his younger age, may least of all his brethren help himself.

Another custom obtaining in many lands of Burgage Tenure which this Bill seeks to abolish is that whereby the Widow is endowed with all, instead of with one-third, of her husband's tenements.

But in addition to and quite apart from the lands of Burgage Tenure there are large tracts of land within and parcel of Manors and Seigniories where the custom of Borough English and other special customs of descent and the customs regu-

lating the rights of husbands and wives in such land prevail, and all of these the Bill, if it passes into law, will abolish.

The use in the Bill of the words "Customary Freeholds," restricted as those words are to customary freehold lands where the freehold is in the Lords, is, as Mr. Knocker points out, likely to cause some difficulty, and—I venture to add—a great deal of litigation.

Our Law Reports disclose a large number of cases which make this fact quite evident.

As Williams J. in his judgment in Passingham *v.* Pitty, 17 C.B. 299 (1855) said, in ALL THESE CASES the question is whether or not it is an essential part of the Title that some part of it should be perfected in the Lords Court. If it be so the freehold is not in the tenant.

Want of space forbids any further reference to this question, but it should be understood that there are many customary and customary freehold lands where the freehold is in the tenant, but which are still subject to special customs of descent, &c. These will, therefore, still remain untouched by the proposed alteration in the law, and the same remark applies to all Manors regulated by special Acts.

It is no part of the Society's work to enter into political controversy or to interfere in any way with just and equitable attempts to bring existing law into line with modern needs, and it is only after having been approached by many small land-owners in Kent, proud of their ancient tenure and convinced that although more ancient it is more equitable than the common law of primo-geniture, that it was resolved to invite our members' views upon the proposed measure.

In this connection it is somewhat significant that the Bill is not backed by any of the Kentish Members of Parliament. Again, it is felt that considering the magnitude of the vested interests the Bill seeks to abolish—and amongst those the rights of many widows and of the daughters of younger sons should not be forgotten—it cannot be considered unreasonable to suggest hat full statistics and convincing arguments based thereon should be adduced before Parliament should intervene to destroy

these ancient Saxon Customs, hitherto preserved inviolate from the innovations of the Norman Conqueror.

As an alternative suggestion to the present Bill, it would appear more equitable to the parties affected and more beneficial to the community at large if Hovenden's suggestion of a century ago were adopted, namely, to RESTORE our ancient code of laws regulating the descent of real property in a manner more simple and more accordant with natural feeling.

CHARLES GREENWOOD,
Registrar of the Manorial Society.

May, 1911.

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Mr. Hills is responsible for the presentation to Parliament in March last of "A Bill to amend the law of Customary Freeholds and Freeholds subject to peculiar Customs."

It is but a short Bill of eleven sections but contains material of no little interest to many present and prospective owners of land in England.

The subject matter readily breaks up into two principal classes—say, A and B.

Class A.—Comprising lands of which the freehold

is in the Tenant Paravail or Terre Tenant (that is the freeholder lowest in the scale of sub-infeudation) and which pass by ordinary deed of Conveyance. The bulk of these are or were held of some Manor and are still or were originally subject to—though not constituted by—some Manorial Custom. The principal effect of the proposed Act as regards all lands in this class would be to assimilate their devolution on the death intestate of the terre tenant. The abolition of customary modes of alienation is provided for, but that is a minor point.

Class B.—Comprising lands, the freehold whereof is not in the customary Tenant or Tenant Paravail but in some Lord of a Manor or other Mesne Lord, and which are either copyholds or customary freeholds. The bulk of these pass by Surrender and Admittance by the rod, and the principal effect of the proposed Act upon them would be, first, to level up the incidents of their tenure if not the tenure itself, and thereby assimilate with Class A their devolution on the death intestate of the Customary Tenant, and, secondly, to provide an additional or alternative method whereby they would pass from one living owner to another.

Lands held in Gavelkind or Burgage Tenure may be found in both classes.

These provisions account for the first five sections of the Bill.

As to the residue, sections 6 and 7 provide that Lands in Class B, and Mortgage estates therein, shall vest in the legal personal representative of the deceased landowner or mortgagee in the same way as lands in Class A, and Mortgage estates therein, have done since the passing of the Land Transfer Act of 1897 and the Conveyancing and Law of Property Act 1881 respectively. On the face of it these proposals seem reasonable, especially in view of the provisions precluding claim being made by the Lord for additional admittances, with the fines due thereon. But it would be interesting to know precisely all the reasons that led the framers of the two last mentioned Acts to expressly exclude Copyholds from their operation.

Sections 8 to 11 preserve intact all existing rights of the Lord of the Manor and his Steward, define the terms employed, limit the operation of the Act to England and Wales, and fix its commencement as from the 1st of January, 1912.

At this point two omissions may be noted: First, the word "Copyhold" does not appear as in the full title of the Bill, though the majority of the sections affect this Tenure, and Secondly the Bill

contains no preamble, although that might have elucidated the precise grievance which the promoters of the Bill seek to remedy. The precise merits of each incident of the several tenures prevailing in England must be largely a matter of opinion, but the difficulties occasioned by the uncertainty existing as to the areal limits of the less common of such Tenures are so obvious that we may fairly infer a preamble reciting the grave objections to the continuance of such uncertainty and the practical impossibility of now delimitating the several areas to which such less common tenures attach. The assumption that this is the principal evil to be remedied will survive the test if applied in the consideration of most of the sections of the Bill.

The Bill is a Land Tenure Bill, and in order to understand the object in view some very brief retrospect as to Tenures is necessary.

It is well said that all lands are held of some one —none but the Crown being absolute owner—and therefore the service of fealty is in strictness due from every Landowner in the Kingdom to the Crown or to some Mesne Lord. It similarly follows that on the failure of heirs or devisees of a decea se landowner able to render such service (and any other accompanying services) and by so doing to "defend"

the land, such land escheats either to the Crown or to some intermediate Lord, next in seignory above the deceased landowner, and of whom such land was theretofore held.

On the death intestate of every landowner it therefore behoves some one not only to claim as heir but to prove his heirship, and inasmuch as there are different rules of heirship for the different classes of Tenure, it is material to first ascertain the particular Tenure under which the land in question was held.

We will deal first with the general law of inheritance and rules of descent. Historians are practically agreed that of the various rules of descent found to attach to lands owned in severalty in England and Wales, the earliest rule required partibility amongst all the sons of the deceased landowner; a rule that has survived most clearly in the County of Kent, to the whole of which it still applies by law, and not by custom, unless reason can be shown to the contrary (*a*). Elsewhere the same partibility is occasionally found, but in such cases the rule obtains not by law but by custom, which latter must be strictly proved.

In Kent at least the same law gives as freebench

(*a*) The writer does not forget that there are some lands in Kent which can be shown to be not Gavelkind.

to the deceased landowner's widow one moiety of the rents and profits receivable during chaste viduity, or, if the landowner so dying is the wife, then her surviving husband takes a similar moiety until he marries again.

These rules of inheritance are the best known incidents of Kentish Gavelkind Tenure.

By 1086, when Domesday Survey was compiled, we find that the feudal system was permeating England as a whole and that the needs of a National Army recruited and maintained on a property qualification and property obligation had already somewhat modified the earlier Saxon rule. The unlimited, and possibly repeated, partition of an estate, the ownership of which carried with it the obligation to furnish one or more fully armed warriors for the King's Army had by that date become, to the King at least, an undesirable occurrence, and therefore not only were attempts made as far as possible to create strict entails in all enfeoffments but the incident of primo-geniture came to be enforced as the general common law of the whole realm. The widow's moiety was for the same reason reduced to one-third, though her re-marriage was encouraged by continuing her enjoyment of this during her life in any event. And, inasmuch as the surviving

husband of a deceased female landowner might well prove more capable of bearing arms than a son who might possibly be an infant, the surviving husband was allowed to enjoy the entirety, rather than a moiety only, of the resulting income of the lady's property. We find, however, that under the feudal system the husband was looked upon in a certain sense as entitled *qua* parent or guardian rather than *qua* husband, and, therefore, unless there was issue of the marriage born alive who could have possibly inherited, the surviving husband took no interest whatever in the deceased wife's lands. And, except in Kent, these are still the rules by the Common Law of England for the devolution of free estates on the death of their owner intestate.

But, apart from the County of Kent, Gavelkind, in the limited sense of partibility of real estates on the death of their owner intestate, occurs in many less defined and less known areas. Mr. Shore (*b*) points out that in parts of Middlesex, especially those parts which were ancient possessions of the See of Canterbury, not only the incidents of tenure, but the names of the districts themselves suggest a

(*b*) Anglo Saxon London, &c., by J. W. Shore, L. & M. Arch. Society (1900), vol. 1, p. 283.

possible colonization from, or at least a close connection with, the County in which Canterbury lies.

Mr. Robinson (*c*), writing about a century ago, states that the same partibility is to be found not only in Middlesex but in half a dozen other Counties, and in all these cases the difficulty of delimitating the precise area affected is probably a sound objection to the continuance of the incident. A further difficulty may arise in proving the actual existence of the custom and such other ancillary customs as may have anciently prevailed in some one or more of the districts in question.

Mr. Elton (*d*), writing in 1867, enumerates other districts similarly affected and suggests that in many parts of Wales the incidents of partibility long survived the general imposition of the primo-geniture of the feudalists, and quotes the existence of an even wider scheme of partitioning as having been claimed in Ireland, a Country not within the scope of the new Bill.

But apart from this question of partibility there are admittedly many other minor customs differing from the Common Law of England which obtain in

(*c*) The Common Law of Kent, &c., by Thomas Robinson, 3rd (1822) Ed., p. 42, et seq.
(*d*) Tenures of Kent, by C. J. Elton (1867), p. 53, et seq.

the whole or in parts of many Manors throughout the length and breadth of the Kingdom. Mr. Moser (*e*), in 1906, collected a few instances of the confusion and hardship entailed by the state of affairs then existing in his own district in Westmoreland, where Borough English and other special rules of descent are found in certain Manors, of which not only the areas but even the precise customs are uncertain. Borough English is also common in the copyhold portions of certain Sussex Manors and is believed to be capable of being substantiated in scattered portions of many of our ancient cities. In all these cases of uncertain area abolition may not only be reasonable but may be desirable. At the same time if any change is to be made let us see that the best obtainable result is assured.

To take the broadest possible view the rules as to Descent in other countries should be collated, especially those in countries where civilization is of most recent origin. Modern needs may not be best served by altering one ancient rule of descent in favour of another but little less ancient, and with nothing except its more general use in England to recommend it. If a Frenchman of to-day dies

(*e*) The Law of Descent, &c., by G. E. Moser. The Law Society's Proceedings, 1906, p. 77.

intestate not only is his real estate in France subjected to partition but he could not, even had he wished to do so, have made a valid will totally excluding any one or more of his children. This rule may tend to reduce pauperism. It certainly tends to discourage emigration. In any event it is not suggested as a rule worth copying, but such comparison is instructive.

A second point to be borne in mind is that the rule of descent which the State makes for its subjects who may die intestate should most nearly correspond with the wishes that subject would have expressed had he left a Will. The case for primogeniture collapses totally in the majority of instances, indeed in almost every case except where the sentimental reasons referred to below apply.

The small property owner, such as the retired tradesman or the artizan or working man who has, say through a Building Society, acquired the house in which he lives, and who has little other property of any kind, will scarcely approve his eldest son ousting all his other children. And the working man, who has, perhaps more than any other, put the present Government in power is entitled to some consideration.

The population of men, women and children in

England and Wales is computed at not less than 30,000,000. Of these only some 970,000 are owners of real estate, but of this reduced number as many as 22,000 die intestate each year, and this latter total must be slightly increased to include those who for one reason or another are found to die partially intestate.

The County of Kent contains approximately one million acres and has a population of a rather larger number of souls. The population represents about 1-25th part of the whole of England and Wales, and therefore the yearly number of intestacies in Kent may be put at about 1,000. No great record, but if any moderate series of years is taken the total number produced is entitled to some consideration. An average population of over one soul per acre is comparatively dense as English Counties go. The Counties in the more agricultural districts, say Lincoln, Norfolk and Suffolk, scarcely produce one man for each 3 acres.

The reader may well find that his experience tallies with the writer's in this respect, that a small number of persons intentionally refrain from making Wills, and therefore die intestate, because they are satisfied that the Statutory or Common Law rules of descent and distribution fit the particular circumstances of

their families. And if it could be ascertained that the number of intestacies is proportionately greater in Kent than elsewhere in England there might be some small recorded evidence that the rule of descent applying to that County is more acceptable than primo-geniture. Such statistics are probably impossible to procure, and the living rather than the dead must be consulted if the people's will is to be known. But of the total number of landowners in Kent a small percentage of persons must account for the greater percentage of land, and this small percentage, though representing the great landowners, is just the section of the whole which is least entitled to consideration. The wealthy can best afford the testamentary documents, or other Settlements, necessary to make adequate provision for their families. It is the comparatively poor who, constituting as they do the majority in number of the land-owning class, should be considered, whilst the measure of the needs of their families should dictate the new policy of land devolution in cases of intestacy.

Again a custom, by no means unusual, that a widow should have the enjoyment of the whole of her husband's real estate during her life is not wholly to be condemned, and represents a

provision commonly found in the Will of the family man.

The new Bill would abolish this, and perhaps rightly so, in favour of the Common Law Dower which, however, has no special advantage over the less frequent custom.

To return to the general issue. Property Qualification was once a phrase to conjure with. The man who owned real estate was considered, and indeed was by law, qualified to perform many acts and enjoy many privileges from which his less fortunate neighbour was precluded. But year by year we see this solid platform of land ownership becoming less and less a material factor. Occupation is adjudged as good as ownership, or the ownership test is abolished in toto. Personal estate, once an almost negligible quantity, has long loomed larger in the scale of public importance and is proving a heavier contributor to the National Exchequer. And, as is recalled by Sections 6 and 7 of the Bill before us, the tendency is to assimilate the rules of both realty and personalty by extending the established principles of the latter to the former.

It is noteworthy that the Gross Income brought under review for the year 1908-9 for the purposes of Income Tax in the United Kingdom exceeds One

thousand Millions of Pounds sterling. Of this huge total only a twentieth part is derived from real estate. (See Answers in the House of Commons, 20th February, 1911.)

As regards primo-geniture, the reason why the eldest son should exclude his brothers has long been an anomaly fostered only by the desire to uphold the family Title or to preserve intact the ancestral home—a sentimental argument of sufficient force to send the younger son to face the world and "win to hearth and saddle of his own" with a cheerfulness and alacrity which is almost astounding to the man in the street with few if any family traditions.

The tendency of modern legislation, however, is all for the breaking up of the big estates, whether by partition or otherwise, and we see compulsory powers of purchase (*f*) unhesitatingly conferred on Local Authorites with the avowed object of evicting the large landowner and establishing in his stead a small ownership peasantry.

The equivalent of "Three acres and a cow" is as good a political cry as ever.

The successor to a large landed estate is officially encouraged to sell or transfer to the Commissioners

(*f*) cf. The Small Holdings and Allotments Act, 1908, Sec. 7 (3), et seq.

(*g*) a portion in order to discharge a devastating death duty imposed on the entirety, and an almost prohibitive stamp duty is now imposed (*h*) on the Family Settlement which might tend to tie up the land for, say, even two generations in strict tail male.

Finally the abolition of female sex-disability is more persistently urged than ever before.

What good reason therefore can be advanced why the real estate of the deceased intestate should not follow precisely the same lines as the same man's personalty. Since 1898 (*i*) it has been equally saleable in his Administrator's hands to pay his debts. Why should it not be equally saleable for the purposes of division? And, when sold, why should not the proceeds be equally divisible amongst his next-of-kin, women included? As suggested above, how many Testators owning a moderate amount of real estate devise the whole to an eldest son?

The answer may well be, "One step at a time—Assimilation of all less frequent Tenures should precede a national extension of the rules of inheritance." Granted that the previous suggestions are

(*g*) The Finance Act, 1894, Sec. 9 (5), and the Finance (1909-10) Act, 1910 Sec. 50.
(*h*) The same Act, Sec. 74.
(*i*) The Land Transfer Act, 1897.

in advance of the time, and granted that the ladies must wait, why should the younger son still suffer?

If partibility amongst heirs male was the first rule, why prefer the later innovation of primogeniture, the justification for which, if ever well founded, has long ceased to exist? Granted that the preference given to a youngest son by the custom of Borough English is bad wherever existing, and granted that the boundaries of much land still subject to this custom are ill defined, why, if a change is to be made, rob all the Smiths minor to reward only the Smiths major? Surely "Half each" is as fair as any other rule! Or again, granted that the objection of ill-definition of custom and bad delimitation of area with resulting confusion applies to all portions of Gavelkind or Borough English Manors in Middlesex or Sussex why apply this objection to the whole County of Kent, the boundaries of which are perfectly defined and well known to everybody?

Kent has peculiar claims to consideration. Her Gavelkind privileges have been allowed and confirmed times out of mind as is testified by a number of Acts of Parliament (*k*). But perhaps this is already safeguarded. The expression "the Custom

(*k*) c.f. The Copyhold Acts, 1841, 1852 and 1894.

of Gavelkind" may not embrace "the Tenure of Gavelkind." The latter, not the former, is the Kentish privilege.

As regards Dower and Freebench, the Kentish rule is that this be limited to one half in any event and that such half should pass on re-marriage from the surviving parent to the children or other heirs of the deceased landowner. This is surely more reasonable than the more artificial incidents of the present English Common Law, a suggestion which is corroborated by the most usual form of the Will of a family man. And desirable though uniformity undoubtedly is, there is scarcely sufficient reason why, by Sections 2 and 3 of the proposed Act the less reasonable, though more usual, practice should oust, at least in Kent, the older and more acceptable rule. There are more younger sons than eldest sons in Kent, as elsewhere, and a referendum to all sons, or even to all landowners, would probably give no uncertain answer as regards this part of the Bill.

So much for devolution on intestacy whatever the tenure—for Sections 6 and 7, extending the powers of the Executor and Administrator, call for no further criticism unless it be that the power of personal representatives to sell for payment of

duties and debts may well be extended in the case of lands held by all tenures, so as to enable a sale to take place for any purpose agreeable and convenient to the parties entitled.

As to modes of assurance inter vivos—this again calls for some retrospect. And first as regards the freeholds covered by class A, supra. The collusive Fines and Recoveries, the Indentures of Bargain and Sale, and the Leases and Releases which succeeded the original Feoffment with livery of seisin are little more than legal curiosities since 1845 (*l*), when the Deed of Grant as simplified by the Act of 1881 (*m*) took the shape which it still bears. It may well be that, by some special custom, Freeholds have in some few Manors been deemed to lie in grant as well as in livery if the deed, when executed with some stated ceremony, be enrolled in the Court Roll of the Manor in question. But the case where any other than the general form of conveyance is now in use must be comparatively scarce.

As regards alienation of Kentish Gavelkind lands, a minor privilege to be abolished by Section 1 of the proposed Bill is that of permitting alienation by

(*l*) The Real Property Act, 1845, Sec. 2.
(*m*) The Conveyancing and Law of Property Act, 1881, Secs. 6 and 7.

feoffment on attaining 15. This practice is found to be a very useful adjunct to the incidence of partible descent, as one or more of the heirs is not infrequently under 21, and can by this means perhaps facilitate the earlier sale of the entirety. Bearing in mind, however, that all customary modes of alienation (other than surrender and admittance if such be essential) are to be assimilated to the common law form in use for freeholds, it is useful to consider what that form entails. And as regards all freehold tenures modified by any subsisting Manorial Custom, and thereunder attracting incidents such as live heriot, &c., the question of acknowledgment of tenure by the Grantee must not be overlooked.

The point applies to lands in Class A, as well as lands in Class B if the Bill should ever become law.

The Statute Quia Emptores of 1290 permits free alienation upon one condition, and upon one condition only, namely, *Ita tamen quod feoffatus teneat terram de eodem capitali domino*, &c.

The English rendering of these words given in the Revised Statutes published in 1870 (by the Queen's Printers) constitutes but one of some half dozen or more mis-translations and errors in the English version of this short Statute of less than half a

dozen sentences. The remaining mis-translations are corrected by foot notes, but the true meaning of the latin words quoted above can only be that the sale of land is permitted upon condition and only upon condition that the feoffee (*i.e.*, purchaser) do hold, and, ergo, do acknowledge that he hold, the lands in question of the same Chief Lord as that of whom the Vendor held. The stipulation as to acknowledgment of holding is a condition precedent if the Chief Lord is to be bound by the transaction. The preamble of the Statute makes it quite clear that the whole Act is passed solely to prevent the losses of seignorial rights which such Chief Lords were then suffering " which thing seemed very hard and extream."

As appears by a large number of Manorial Records in the writer's hands, acknowledgment by a purchaser or incoming freeholder of his tenure (whether free or base) in some form or another was formerly insisted on by the Lord's Steward, but the point is now frequently overlooked. The Statement of Claim in the recent case of Copestake *v.* Hoper (*n*) would have been very differently drafted and the decision of the Court of Appeal could hardly have been what it was had this point been borne in

(*n*) C. A. (1908) 2 Ch. 10.

mind. And the mode of alienation of freehold lands still requires this ceremony if the alienor would bind the Lord to look to the alienee alone for his manorial dues.

To proceed, there are special provisions in Sections 1 (2) and 4 abolishing all special customs for a married woman to convey without being examined apart from her husband. Since 1883 (*o*) there have been few occasions necessitating either the joinder of the husband in a deed conveying the wife's property or the wife's separate examination, and it is scarcely clear why a woman who already has independent rights by statute should be denied similar rights which may accrue by custom. The point seems, however, to be of small importance.

Dealing now with the question of the alienation of Copyhold or other lands in our original Class B. The proposed Act will be in this respect an enabling statute. No existing method is abolished, but the most usual and simplest form of grant is declared to suffice in any event. The benefit in question is limited to lands which can now be alienated in one way or another without the actual necessity of the Grantee going through the ceremony of surrendering. And if the only method of alienation entails a

(*o*) The Married Women's Property Act, 1882, Secs. 1, 5, &c.

surrender by the alienor and admittance of the surrenderee then the enabling provisions are withheld.

The object in view may be to provide a simpler method of alienation in all cases where the stricter practice as to pure Copyholds is no longer observed, and at the same time to preclude a multiplication of fines arbitrary greater than heretofore, but the new provisions may be expected to provoke some little legislation to deal with special instances.

Sections 6 and 7 have already been sufficiently referred to.

Section 8 is a maintaining clause, and doubtless in the opinion of the Socialist might have been usefully omitted. Under it, subject to the alterations in the law made by the Act, the Lord's manorial rights and dues and the Steward's fees are not to be impaired or reduced. This may not quite harmonize in practice with Section 5, which permits the use of the simpler forms of alienation than heretofore. For assuming that the Steward claims the right to prepare the more complicated documents he will doubtless charge under Section 8 the same fees as heretofore, whether his labours be lightened under Section 5 or not. Further, Section 8 may be unexpectedly affected by Section 1. For a

widow claiming her dower by the Common Law of England is deemed the Tenant of the heir at law, but the same widow in respect of her freebench in Copyholds is Tenant of the Lord. The conversion of the inferior tenure, and the substitution thereby effected of dower for freebench, may, on the death of the doweress, rob the Lord of heriot and other manorial incidents which would otherwise be preserved to him by Section 8.

As to the definition section. The expression "Customary Freehold" is likely to cause some difficulty. In the Bill the words extend to all lands commonly so called wherein the freehold is in the Lord, &c. This is a much more restricted class than that commonly called "Customary Freeholds," for this expression is usually loosely applied not only to lands constituted by custom (of which the freehold is in the Lord) but also to lands merely modified by custom, of which the freehold is in the tenant.

The expression as used in the Bill is also obviously narrower than the similar expression used in the Copyhold Act, 1894, which includes "Customary Freeholds" in the expression "freeholds." Similarly the "customary" tenure referred to in this Bill has a narrower scope than the "customary

tenure" referred to in the Act of 1894 which must be deemed to include freeholds merely modified by custom. Many such latter freeholds have, to the writer's knowledge, been enfranchised under the Copyhold Act in question.

Again there are classes of Manorial holdings the legal estate in which passes by a deed of special customary form acknowledged before, say, two of the Tenants of the Manor and subsequently enrolled by the Steward, and the writer conceives that it may be a matter of grave doubt whether the freehold is in the Tenant or whether it is in the Lord.

In view of the sharp distinction drawn between lands in which the freehold is in the Tenant and those in which the freehold is in the Lord it may be useful to consider that class of cases which are commonly called "Freehold Grants" of manor wastes purporting to be conferred in fee simple by the Lord of the Manor with the consent of the Homage, and expressed to reserve Fealty, Suit of Court, Heriot, Relief and an annual Quit Rent, but evidenced by nothing more than the entry on the Court Rolls of the "Grant," and the certified copy handed to the "Grantee." Such grants occur in considerable numbers in many parishes, at least in S.E. England. Now in Manors where the Tene-

mental portions are copyhold and the custom has prevailed time out of mind of carving out further portions of the waste and other demesne lands by grants of the same to be held by copy of Court Roll (*p*) and the other services above mentioned the position is easy to understand. The new copyhold tenement is a pure creation of the custom and deemed to be thereby as ancient as the original custom which attached and continued to attach to all the demesnes as and when granted out. But in the case of freehold grants the position is different. First, the Grant not being under the Lord's seal is not effective to pass the legal estate, and secondly, if the grant were effective or if (as is sometimes done by a confirmatory deed) it were made effective there cannot have been since 1290 any new sub-infeudation.

The Statute Quia Emptores is conclusive on this point. The Grantee must hold of the Crown or other superior lord of whom the Lord of the Manor holds. The reservation of fealty is inoperative, and the other "services" reserved attach by reason of the express reservation in the Grant, not by reason of the custom. The writer has searched in vain for any really early consistent series of instances of

(*p*) Scriven on Copyholds, 1846, Ed., pp. 16, et seq.

these freehold grants, and is driven to the conclusion that they are probably a comparatively modern "gloss" on the Manorial practice, perhaps first introduced in manors in which no copyhold tenements were found to exist, or possibly evolved from an earlier system of making such grants for a term of years—a procedure eminently justified from a legal point of view and which the writer has found prevailing in certain manors.

As appears by opinions in the writer's hands, Mr. Elton and other leading authorities have unequivocally advised against the validity or sufficiency of such freehold grants. The new Tenant, if he acquire any legal estate at all must be deemed to have acquired it by adverse possession and not by conveyance. The heriot is probably Suit Heriot not Heriot Custom. The writer knows of one or two instances of Manors still subject to family Settlements of some fifty years' standing, and in these cases the Statute of Limitations may not yet have run in favour of a "Grantee" with over 40 years' "Title" to the prejudice of subsequent lords, who are themselves only tenants for life or in tail under the family Settlement and who may not be bound by their predecessor's act, and against whom the "Grantee" may acquire no title by adverse posses-

sion. In another instance a group of extensive Manors was settled by a Will taking effect in 1807 in respect of which no fee simple matured for nearly one hundred years and a "Grantee" of, say, 1810 could not successfully plead the Statute of Limitations until after the expiration of the same long period. Many of such grants with the buildings thereon are of considerable value, but it may be by no means clear where to locate the freehold estate, or to define precisely the extent to which such lands are created or modified by custom or to say whether they are "Customary Freeholds" within this Bill or not.

It may here be noted that the usual saving clause in favour of estates belonging to the Crown in right of the Duchy of Cornwall and similar exceptions find no place in the Bill.

On the whole the most unnecessary effect of the proposed Act seems to be the abolition of Kentish Gavelkind and the substitution of primo-geniture for Borough English where such latter incidence is found in Kent. As regards the latter tenure it would be a simple thing to stipulate that Borough English when found in Kent should give place to the rule in Gavelkind, and when found elsewhere should give place to the Common Law of England.

While as regards the question of Kentish Gavelkind as a whole, the arguments in favour of the older Tenure are as sound as any that can now be advanced in favour of descent according to the English Common Law, and the writer commends to the supporters of the Bill the suggestion that they should incorporate Section 95 (a) of the Copyhold Act, 1894, and provide that "Nothing in this Act shall affect the Tenure of Gavelkind in the County of Kent."

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